
**United States Court of Appeals
For the Ninth Circuit**

ARTHUR A. ARNHOLD, ET AL., *Appellants*,
and
TRAVELERS INDEMNITY Co., a Connecticut
corporation, et al., *Additional Appellants*,
vs.

UNITED STATES OF AMERICA and PORT ANGELES &
WESTERN RAILROAD COMPANY, INC., a Delaware
corporation, *Appellees*, and
FIBREBOARD PRODUCTS, INC., a Delaware corporation,
and A. R. TRUAX, Trustee in Reorganization,
Additional Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

**PETITION FOR REHEARING ON BEHALF OF PORT
ANGELES AND WESTERN RAILROAD COMPANY,
AND A. R. TRUAX, TRUSTEE IN REORGANIZA-
TION, AND FOR REMANDING FOR
ADDITIONAL FINDINGS**

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FRANK H. SEAMAN



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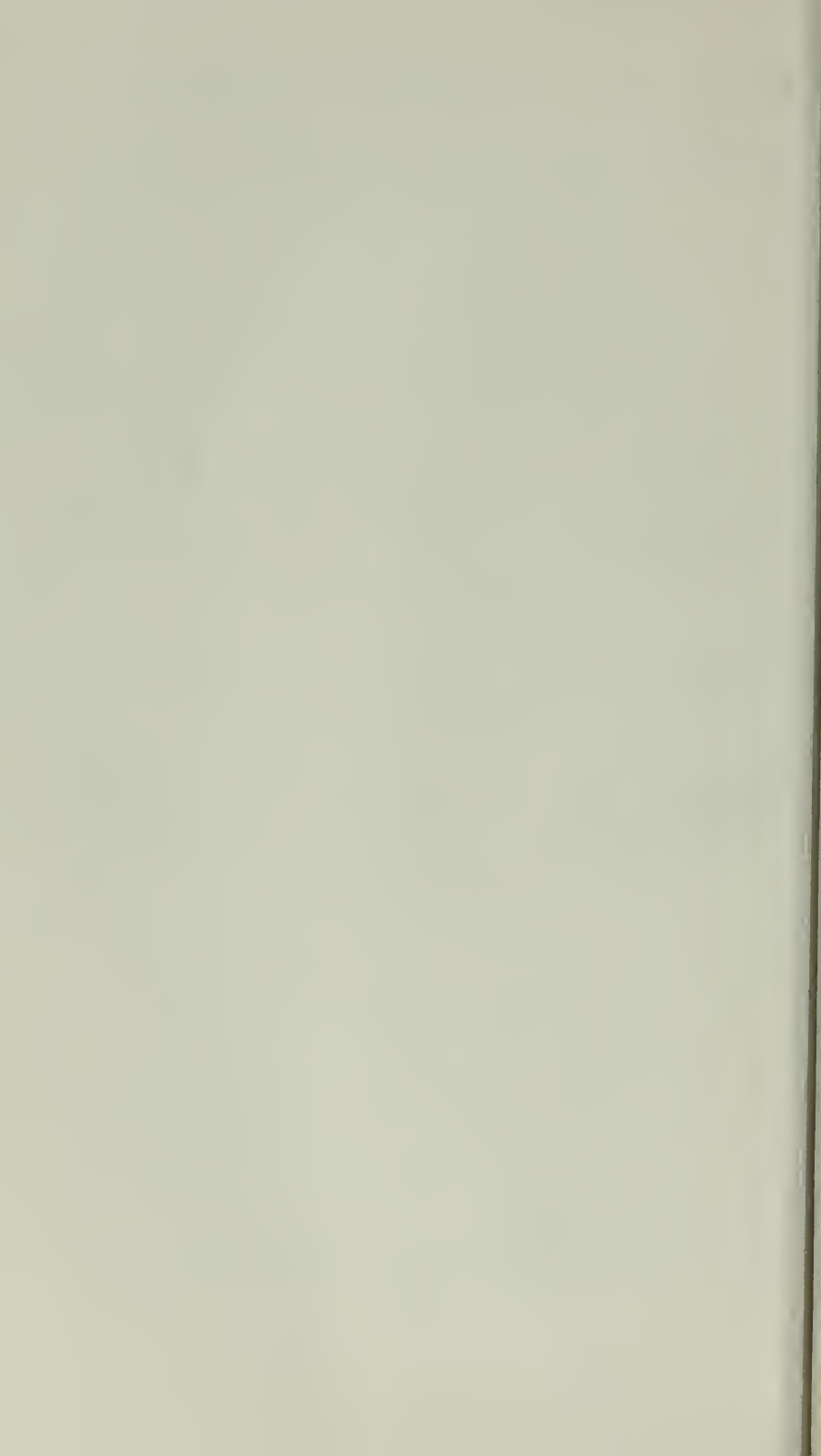
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No. 16367

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PETITION FOR REHEARING ON BEHALF OF PORT ANGELES AND WESTERN RAILROAD COMPANY, AND A. R. TRUAX, TRUSTEE IN REORGANIZA- TION, AND FOR REMANDING FOR ADDITIONAL FINDINGS

To the UNITED STATES COURT OF APPEALS for the NINTH
CIRCUIT and to POPE, MAGRUDER and MERRILL, HON-
ORABLE JUDGES THEREOF:

Come now the Port Angeles and Western Railroad
Company and A. R. Truax, Trustee in Reorganization,
Appellees, hereinafter referred to jointly as the rail-
road, and present this, their petition for a rehearing of
the above entitled cause, and, in support thereof, re-
spectfully show:

I.

That a determination of the liability of the parties to this cause must necessarily depend upon the law of the State of Washington, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487. However, no Washington cases were cited by the Court in reaching its decision, the Court having said on page 5 of its Opinion filed herein on October 26, 1960, "We may also take it, though we have no Washington cases that we can cite, that the State of Washington does not, as does the State of New York, use the doctrine of 'proximate cause' somewhat arbitrarily to cut off a liability that would otherwise rest upon a negligent actor." It is contended that the Supreme Court of the State of Washington has rendered a number of decisions, of which *Scobba v. Seattle*, 31 Wn.2d 685, 198 P.2d 805, is but an example, which should control the issue of proximate cause herein. Since the Court has held that the railroad's liability arises from the negligence of the United States of America, a holding which we believe we should not have anticipated, it is believed that a rehearing should be granted to allow the railroad to present fully the Washington law on this issue, which was not raised in oral argument before this Court.

II.

That under the Washington case law, as exemplified by *Scobba v. Seattle, supra*, a plaintiff must prove to the satisfaction of the trier of fact that his damages would not have occurred "but for" the negligence of the defendant. This Court said on page 6 of its Opin-

ion, "But it is perfectly clear from the court's findings that, had the United States not been initially negligent, the Heckelville spot fire would have been extinguished before it finally spread . . ." It is submitted that this statement is inconsistent with the following quoted portion of the District Court's Amended Finding XVI: "Whether, or at what time and place, the fire might have been contained or suppressed within said area (the 60-acre area) but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area." Contrary to the statement of this Court on page 6 of its Opinion, where it is said: "The burden of proof is certainly not upon the plaintiff to show that, had the defendant not been negligent at the start, the fire would have been contained within any particular space," under Washington case law, the plaintiff does have this burden of proof.

III.

That in its opinion filed the 26th day of October, 1960, the Court, acting on the assumption that the railroad was a party to the cooperative agreement under 16 U.S.C. § 572 and R.C.W. 76.04.400, held the railroad liable on the grounds that it had a non-delegable duty, as a landowner with knowledge of a fire burning on its land, to exercise ordinary and rea-

sonable care to prevent its spread and that its duty in this regard was breached by the negligence of the United States of America, its "delegatee." However, this holding should be corrected in that the record establishes several facts, some of which were of no importance to the District Court's holding, but which become particularly significant under the holding of this Court. These facts, not fully brought out by the briefs filed herein or by argument before this Court, establish that: (1) The Heckelville fire was found by the District Court not to have been negligently started, which finding this Court has not disturbed; (2) The Forest Service discovered the Heckelville fire, sent its men to control and suppress it, and assumed control of fire fighting activities, before the railroad had knowledge of that fire, and without the railroad having delegated, either expressly or impliedly, the Forest Service so to act; (3) The Forest Service's response to the Heckelville fire was as a volunteer, and public fire fighter, having discovered the fire, and in fulfillment of its duties as a landowner, the government owning the fee over which the railroad's right-of-way ran, as well as the adjoining land, and, additionally, in fulfillment of its obligations under the cooperative agreement, to which the railroad was not a party; (4) When the Forest Service men reached the scene of the fire, the fire had already spread from the railroad's right-of-way to the government-owned land adjoining it, and all subsequent danger of spread was not from the right-of-way, but from the lands exclusively owned and controlled by the government; (5) The railroad

had no knowledge of the existence of the Heckelville fire until the danger of spread of that fire was from the lands of the government, at which time the railroad took, independent of the Forest Service of the United States, prompt and immediate action, within the limitations of its capabilities, to control and suppress the fire on and along its right-of-way, additionally lending what assistance it could to the Forest Service.

IV.

Because of the far-reaching implications of a decision in this case and its effect on the rights and duties of all landowners within the State of Washington, as well as on the rights and duties of the United States of America, it is earnestly believed that this case merits a rehearing *en banc*.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, respectfully suggested that it be granted *en banc*, and that the judgment of the District Court be, upon further consideration, affirmed, and that in any event, the case be remanded to the District Court for additional findings which are needed in light of this Court's decision.

Respectfully submitted,

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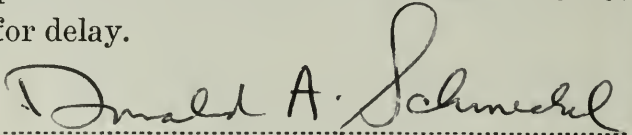
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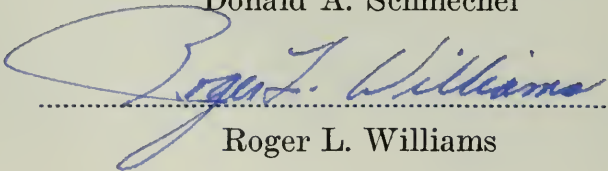
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CERTIFICATE OF COUNSEL

DONALD A. SCHMECHEL and ROGER L. WILLIAMS, of Counsel for Appellees Port Angeles & Western Railroad Company, Inc. and A. R. Truax, Trustee in Reorganization, hereby certify that in their judgment the accompanying Petition for Rehearing on behalf of said Appellees is well founded and that it is not interposed for delay.



Donald A. Schmechel



Roger L. Williams